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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-1741

ALPHONSE PERSICO,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

JERRY LANGELLA,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

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In the

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Nos. .....

Alphonse Persico,

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit affirming petitioner Persico's adjudication of contempt is reported at 491 F.2d 1156 and is set out in the Appendix, *infra,* at pp. 1a-14a. The oral findings of the district court (Judd, D.J.) adjudging Persico in con-

tempt are unreported and are set out in the Appendix, *infra*, at 46a.

The oral findings of the district court (Dooling, D.J.) adjudging petitioner Langella in contempt are unreported and are set out in the Appendix, *infra*, at 51a-65a.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit affirming petitioner Persico's contempt adjudication was entered on February 19, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The judgment of the United States District Court for the Eastern District of New York adjudging petitioner Langella to be in contempt was entered on April 17, 1974. A notice of appeal to the United States Court of Appeals for the Second Circuit was filed on April 25, 1974. The record was docketed in the Court of Appeals on May 13th, 1974. Certiorari is sought prior to judgment in the Court of Appeals pursuant to 28 U.S.C. §2101(e). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

(1) Is a grand jury witness entitled to litigate the legality of electronic surveillance in defense to a contempt citation, where it is conceded that the witness is being questioned as a result of electronic interception of his own conversations?

(2) Is a grand jury contemnor entitled to a suppression hearing to determine whether 18 U.S.C. §2515 has been vio-

lated by the disclosure of allegedly unlawful electronic interceptions to that grand jury?

(3) Is a summary contempt adjudication under 28 U.S.C. §1826(a) sufficiently criminal in nature so as to require the notice and hearing provided for in Rule 42(b) of the Federal Rules of Criminal Procedure?

(4) Was the explanation of the scope of the immunity given by government counsel to petitioner Persico sufficiently incomplete so as to require vacating the order of contempt?

Constitutional Provisions and Statutes Involved

These cases involve the Fourth, Fifth and Sixth Amendments to the United States Constitution; Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. §211 [18 U.S.C. §§2510-2520]; the Organized Crime Control Act of 1970, 84 Stat. §935 [specifically, 18 U.S.C. §3504 and 28 U.S.C. §1826(a)]; 18 U.S.C. §6002, 84 Stat. §927; and Rules 41(f) and 42(b) of the Federal Rules of Criminal Procedure.

Statement of the Case

A. *Persico*

In the spring of 1973 an electronic surveillance device was installed in Alphonse Persico's home. As required by 18 U.S.C. §2518(8)(d), petitioner later received notice of this surveillance.[1]

[1] Petitioner commenced a civil action in the United States District Court for the Eastern District of New York in August 1973 to compel disclosure of the electronic surveillance and to suppress

Subsequently, in December 1973, petitioner was served with a subpoena requiring him to appear before the Special September 1972 grand jury in the Eastern District of New York, returnable on January 23, 1974.[2]

On that date, Persico appeared and was sworn as a witness. After asserting his Fifth Amendment privilege not to testify, Persico was informed that immunity had been conferred on him by order of the Honorable John R. Bartels, U.S.D.J. on December 28, 1973 (19a, 23a).[3]

Persico then refused to answer on the ground that the questions being put to him as well as his very presence as a witness were the fruits of unlawful electronic surveillance of his home. Persico specifically relied on 18 U.S.C. §2515, Rule 41f, of the Federal Rules of Criminal Procedure, and the opinion of the Honorable John F. Dooling, U.S.D.J., issued on January 2, 1974, in *In re Vigorito,* 368 F. Supp. 613 (E.D.N.Y.) (24a-25a).

The government acknowledged that electronic surveillance devices had been installed at Persico's home pursuant to a court order signed March 21, 1973 authorizing interceptions for 15 days (38a). Extension orders were

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its use against him. In a memorandum opinion, the Hon. John F. Dooling, U.S.D.J., held that the application was premature since there was no anticipated use of the electronic surveillance which could be ordered suppressed. See, *In re Persico,* 362 F. Supp. 713 (E.D.N.Y. 1973).

[2] Persico's subpoena was originally returnable in December 1973 and was adjourned on Persico's application until January 9, 1974. On that date the grand jury did not obtain a quorum. Although Persico was not sworn as a witness, the Honorable Orrin G. Judd, U.S.D.J., heard Persico's applications on that date.

[3] Numbers designated "a" in parentheses refer to pages of the Appendix, *infra.*

signed on April 9 and May 8, 1973, each authorizing interceptions for 15 days (38a).

Petitioner first declined to answer the following question:

> "Question: Mr. Persico are you employed" (27a)?

The district court held that there was an insufficient showing that the particular question was predicated upon the surveillance of Persico's home and therefore ordered Persico to respond (28a-29a). Persico returned to the grand jury and then answered all questions concerning his lawful employment (30a-33a). After this series of questions Persico was asked:

> "Question: Are you employed in any other occupation or do you own any business" (33a)?

Persico again refused to answer on the ground that the questions relating to his employment were the fruits of unlawful electronic interceptions (33a). Government counsel admitted that the proposed questions were based on electronic surveillance:

> "Mr. Del Grosso: There are questions that have been formulated as a result of electronic surveillance which will deal with his employment. Yes, that is true, your Honor" (29a).

Persico then moved for production of the surveillance orders and supporting affidavits for inspection so that counsel could make a determination whether the witness had "just cause," within the meaning of 28 U.S.C. §1826 (a), to refuse to answer based on the facial invalidity of the orders (34a-36a). The Court refused this relief

and instead examined the orders *in camera*, a procedure which Persico contended was inadequate (40a-41a).

In part, the Court bottomed its action on the theory that *Gelbard* v. *United States*, 408 U.S. 41 (1972), had been limited by *United States* v. *Calandra*, —— U.S. ——, 38 L. ed.2d 561 (1974), thus rejecting Persico's contention that *Calandra* specifically exempted from its holding the statutory remedy of §2515 and that the opinion therein was bottomed exclusively on the Fourth Amendment. It then denied Persico's motion to suppress (41a).

Persico was ordered to return to the grand jury and answer the question. This he did (41a). Persico answered questions pertaining to his own gambling activities (42a). He was then asked:

> "Question: The question was, who were the individuals who worked for you" (42a)?

Persico refused to answer this question on the ground that he believed it derived from the unlawful electronic surveillance of his home and on the ground that the immunity conferred, as explained, was not commensurate with his Fifth Amendment privilege (43a-44a).

Persico was again brought before the district judge who held him in contempt pursuant to 28 U.S.C. §1826(a) and sentenced him to 60 days in jail. Counsel then moved for a hearing pursuant to Rule 42(b) F.R. Cr. P. (46a). The court ordered a hearing but remanded Persico (46a). The court indicated that Persico could purge the contempt before the expiration of the 60 days by answering (46a). The court further directed that the contempt was being imposed pursuant to 28 U.S.C. §1826(a).

On the following day, at a hearing, Persico attempted to defend against the contempt citation by demonstrating that the questions put to him were the fruits of unlawful electronic surveillance in violation of 18 U.S.C. §2515. Persico again renewed his motion to suppress seeking production of the surveillance orders and supporting papers. The application was again denied as was Persico's application for bail pursuant to 28 U.S.C. §1826(b)(5a-6a). On January 28, 1973, the United States Court of Appeals for the Second Circuit denied Persico bail but directed that Persico's appeal be heard on an expedited basis (6a), which it was on February 5, 1974.

On February 19, 1974, the Court of Appeals rendered its opinion affirming the order of contempt and imprisonment against Persico.

In March, 1974, applications for bail pending certiorari were denied by both Mr. Justice Marshall and, following referral to Mr. Justice Douglas, by the full court respectively. See 39 L. ed.2d 868.

On March 12, 1974, following petitioner's release from custody, the Hon. Jacob Mishler, Chief United States District Judge for the Eastern District of New York, signed an order extending the life of the grand jury of which Persico was adjudged to be in contempt.

It was this extended grand jury before which petitioner Langella was subpoenaed to appear.

B. *Langella*

In April 1974, petitioner Langella was also served with a subpoena, returnable April 17, 1974, also directing him to appear before the Special September 1972 grand jury in the Eastern District of New York. Following his en-

trance into the grand jury and the administering of the oath and the conferring of immunity, petitioner Langella read the following statement to the grand jury:

> "I believe that my voice has been recorded and that this investigation and the questions that are to be asked of me are based upon information obtained as a result of the electronic interception of my conversations.
>
> "I, therefore, respectfully ask to be taken before a District Court Judge to be advised whether my conversations have been electronically intercepted and, if so, whether it is based upon a Court Order and Affidavit.
>
> "I respectfully request that a hearing be held pursuant to Title 18, United States Code, Section 2515 to determine the validity of its execution.
>
> "Upon information and belief, I believe that my conversations have also been recorded by the State of New York or the District Attorney's Office of New York County or the Police Department of the State of New York. I believe that this investigation and the questions to be asked of me are also based in full or in part on that electronic interception.
>
> "I, therefore, request that I be advised before a District Court Judge as to whether or not such interception has taken place and, if so, I request that I be advised whether such interception was based on a Court Order and, if so, I request that a hearing be held to determine the validity of that Order and its execution or, in the alternative, any such Order be submitted to this Court for examination. I assert all of these rights under the *Egan* and the *Gelbard* cases" (21a).

Thereafter, Langella, his counsel, and government counsel appeared before Judge Dooling. Pursuant to 18 U.S.C. §3504(a)(1) and this Court's opinions in *Gelbard* and *Egan* v. *United States*, 408 U.S. 41 (1972), Langella requested the government to affirm or deny whether the questions to be propounded to him were based upon electronic surveillance.[4] The government reluctantly conceded that "some of the questions" would be (54a).

Following this admission by the government, counsel for Langella requested Judge Dooling to examine, *in camera*, the orders authorizing the surveillance of Langella. Al-

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[4] Unlike Persico, Langella was never formally served with an inventory pursuant to 18 U.S.C. §2518(8)(d), although the government had attempted to do so (57a). However, in December 1972, Langella was subpoenaed to appear before a New York state grand jury. Langella commenced an action in the New York state courts to quash the state subpoena similar in nature to the motion which was the subject of Judge Dooling's opinion in *In Re Persico*, *supra*. Langella's motion to quash was denied. However, the state prosecutor admitted during argument on the motion to quash that Langella's voice had been intercepted by a surveillance device which had been installed pursuant to a state court order. P. 7, transcript of Proceedings on Motion to Quash in *Langella* v. *New York*, —— N.Y.S.2d ——, No. 25584-72 (Sup. Ct. N.Y. Dec. 19, 1972). Langella was eventually indicted for his refusal to answer certain questions before the state grand jury. Motions to dismiss that indictment on *Gelbard* grounds are now *sub judice* in the New York State courts.

During the course of the arguments below on Langella's federal contempt, it was revealed that questions were also to be propounded to Langella in the federal grand jury based upon his testimony in the state grand jury. Thus, the federal prosecutor's statement (54a) that he was not intending to question Langella on the basis of any state intercepts, while technically correct, was misleading. If the questions propounded to Langella in the state grand jury were admittedly based upon electronic eavesdropping and the federal prosecutor intended to question Langella in the federal grand jury on the basis of the state grand jury proceedings, it can hardly be contended that the fruits of a state interception were not being utilized before the federal grand jury.

though this procedure had been followed by Judge Judd in the case of petitioner Persico, see 491 F.2d at 1158 (39a), Judge Dooling declined to do so (58a). Counsel for Langella then raised a number of other legal objections to the subpoena and the proposed grand jury questioning which are not the subject of the instant petition. These motions were also denied. Langella was then directed to again appear before the grand jury, which he did (59a).

Upon his appearance before the grand jury, Langella refused to testify on grounds relating to [illegible]ed insufficiency in the immunity granted. (This issue is not here raised by Langella.) Motions to quash on this ground were also denied and Langella again returned to the grand jury.

One hour later, Langella, his counsel and the government prosecutor appeared before Judge Dooling. The government requested that Langella be cited for contempt pursuant to 28 U.S.C. §1826(a) on the ground that Langella had, ironically, refused to answer the following question:

"Do you know Alphonse Persico" (61a)?

Following the interposing of defenses other than those related to electronic surveillance, Langella was adjudged to be in contempt pursuant to 28 U.S.C. §1826(a) and sentenced to imprisonment for the life of the grand jury. Bail pending appeal was denied (65a). Petitioner Langella is presently incarcerated.

Proceedings Below

On appeal to the United States Circuit of Appeals for the Second Circuit, petitioner Persico's adjudication of contempt was affirmed.

Following Langella's remand, he filed a Notice of Appeal to the United States Court of Appeal for the Southern Circuit and timely docketed the record in that court. However, since his arguments relating to unlawful electronic surveillance are foreclosed by that circuit's prior decision in the case of petitioner Persico, Langella seeks review solely of this question prior to judgment in the Court of Appeals pursuant to 28 U.S.C. §2101(e).

In its opinion, the Court below conceded that this Court's decisions in *Gelbard* and *Egan* permitted an immunized grand jury witness to refuse to answer a question derived from "concededly" unlawful electronic surveillance and to defend against any contempt citation for such a refusal. 491 F.2d at 1160 (7a). However, relying principally upon the concurring opinion of Mr. Justice White, in *Gelbard*, the court below went on to hold that,

> " . . . when, during grand jury proceedings, the government does produce a court order the traditional notion that the functioning of the grand jury system should not be impeded or interrupted could prevail at that time over the witness's interest in exploring in depth the validity of the surveillance." 491 F.2d at 1160 (8a).

This conclusion, the court below asserted, was supported by both the legislative history of 18 U.S.C. §2518(10)(a)

as well as this court's opinions in *United States* v. *Calandra*, —— U.S. ——, 38 L. ed.2d 561 (1974) and *United States* v. *Dionisio*, 410 U.S. 1 (1973).

The court below concluded that,

> "... the refusal [to testify] would be permissible only if there is any absence of a necessary court order or if there is a concession from the government that the surveillance was not in conformity with statutory requirements or if there is a *prior* judicial adjudication that the surveillance was unlawful." 491 F.2d at 1162 (12a).

By reason of Judge Judd's *in camera* inspection of the orders, the court below reasoned the petitioner Persico received "all that he was entitled to receive." *Id.* Petitioner Langella was not afforded even this minimal review (58a).

The Court of Appeals also rejected Persico's arguments that a §1826(a) contempt is sufficiently criminal in nature so as to require a notice and hearing pursuant to Rule 42 of the Federal Rules of Criminal Procedure and that the immunity conferred upon him, as explained, was not coextensive with his Fifth Amendment privilege.

REASONS FOR GRANTING THE WRIT

I.

The decision below emasculates this Court's decision in *Gelbard* and *Egan* and is based upon misreadings of the opinions in *Calandra* and *Dionisio* and the legislative history of Chapter 119 of Title 18 of the United States Code.

These cases present important issues concerning the rights of a grand jury witness to refuse to answer questions based on unlawful electronic surveillance and the scope of the witnesses rights to litigate the legality of such surveillance.

The operable facts are not in dispute. Petitioners were overheard by electronic eavesdropping devices and were then subpoenaed before a grand jury and refused to answer questions on the ground that the questions were the product of unlawful electronic surveillance. The government has conceded that the questions asked of petitioners resulted from the electronic surveillance.

The legal contentions are also narrowly drawn. Petitioners do not predicate their right to refuse to answer on the Fourth Amendment. This Court's decision in *United States* v. *Calandra*, —— U.S. ——, 38 L. ed.2d 561 (1974), has laid to rest the contention that the fruits of an unlawful search and seizure, not involving unlawful electronic surveillance, are inadmissible before a grand jury. However, contrary to the conclusion of the courts below, *Calandra* recognized and distinguished the statutory rights upon which petitioners rely,

"The dissent's reliance on *Gelbard* v. *United States*, 408 U.S. 41 (1972), is misplaced. There, the Court construed 18 U.S. § 2515, the evidentiary prohibition of Tit. III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211, as amended, 18 U.S.C. §§ 2510-2520. It held that § 2515 could be invoked by a grand jury witness as a defense to a contempt charge brought for refusal to answer questions based on information obtained from the witness' communications alleged to have been unlawfully intercepted through wiretapping and electronic surveillance. The Court's holding rested exclusively on an interpretation of § 2515 and Tit. III, which represented a congressional effort to afford special safeguards against the unique problems posed by misuse of wiretapping and electronic surveillance. There was no indication, in either *Gelbard* or the legislative history of Tit. III, that § 2215 was regarded as a restatement of existing law. As Mr. Justice White noted in his concurring opinion in *Gelbard*, § 2515 'unquestionably works a change in the law with respect to the rights of grand jury witnesses. . . .'" —— U.S. ——, 38 L. ed.2d 575-576 n. 11. (Emphasis added.)

Also not in issue here is the right of a grand jury witness, who has *not* been held in contempt, to litigate the legality of the electronic surveillance which forms the basis for his questioning.[5]

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[5] Thus, governmental reliance on cases such as *Cali* v. *United States*, 464 F.2d 475 (1st Cir. 1972) is misplaced. It should, however, be noted that relief short of a full-blown motion to suppress has been accorded to pre-contempt grand jury witnesses. In *In re Vigorito*, 368 F. Supp. 613 (E.D.N.Y.) (Memorandum and Order of January 2, 1974, reconsideration denied January 14, 1974 and January 30, 1974), appeal argued and pending, No. 74-1322 (2d

In contrast to these questions, the issue presented by this petition is whether a grand jury witness, in contempt proceedings under 28 U.S.C. §1826(a), may defend on the ground that the question put to him violated 18 U.S.C. §2515 because it was the fruit of unlawful electronic surveillance. More accurately, since that precise question was answered affirmatively by this Court in *Gelbard* v. *United States, supra,* the issue this Court should now decide is the scope of the hearing which must be afforded a contemnor to litigate the legality of the challenged surveillance.

This Court has already decided the predicate issue in petitioners' favor.

Gelbard involved two sets of petitioners in different factual postures. Gelbard had been adjudged in civil contempt pursuant to 28 U.S.C. §1826 after refusing to answer questions which he contended were based on unlawful electronic surveillance. Gelbard had been informed that the surveillance was pursuant to court order. 408 U.S. at 44. He sought an opportunity to challenge the legality of the interceptions, which was denied him. The Ninth Circuit affirmed the order of civil contempt. This order was reversed by this Court.

Cir. 1974), subpoenaed individuals were compelled to give voice exemplars which the government intended to compare with electronic interceptions made pursuant to court order for the purpose of establishing the identity of the voices intercepted. The witnesses urged that the electronic surveillance was unlawful and moved to suppress its use before the grand jury and for return of their recorded conversations. Judge Dooling held that, while a full-blown motion to suppress was not proper at that stage of the proceeding, the government must disclose to counsel for the witnesses the orders and supporting papers authorizing the interceptions.

Egan had been adjudged in civil contempt pursuant to 28 U.S.C. §1826 for refusing to answer questions, after receiving transactional immunity, which she contended were predicated on unlawful electronic surveillance. The government refused to confirm or deny the existence of such electronic surveillance. The district court adjudged Egan in contempt. The Third Circuit reversed this order. This Court affirmed.

As phrased by this Court, the two main issues resolved in *Gelbard* were:

> "The question presented is whether grand jury witnesses, in proceedings under 28 U.S.C. §1826(a) are entitled to invoke this prohibition of §2515 as a *defense* to contempt charges brought against them for refusing to testify. . . . the Court of Appeals for the Ninth Circuit held that they are not entitled to do so . . . The Third Circuit, en banc, reached the contrary conclusion . . . We disagree with the Court of Appeals for the Ninth Circuit and agree with the Court of Appeals for the Third Circuit." 408 U.S. at 43-44.

The related issue was:

> ". . . whether a showing that interrogation would be based upon the illegal interception of the witness' communications constitutes a showing of 'just cause' that precludes a finding of a contempt." 408 U.S. at 45.

This question likewise was answered in the affirmative.

In simplest terms, this Court decided in *Gelbard* that 18 U.S.C. §2515 prohibited the compulsion of testimony

before a grand jury where the questions were predicated on unlawful electronic surveillance. Secondly, this Court decided that if the questioning was based upon unlawful electronic surveillance the witness had "just cause" to refuse to answer and could not be held in contempt pursuant to 28 U.S.C. §1826(a). Third, it was held that 18 U.S.C. §2518(10)(a) does not permit the making of a motion to suppress evidence before a grand jury so as to prevent indictment based on illegal electronic surveillance or to dismiss an indictment predicated on illegal electronic surveillance because grand juries are exempted from the forums enumerated in §2518. *"But it does not follow from the asserted omission of grand jury proceedings from the suppression provision that grand jury witnesses cannot invoke §2515 as a defense in contempt proceedings under 28 U.S.C. §1826(a)."* 408 U.S. at 59 (emphasis added). This Court thus held that the remedy is to move to suppress in court, in defense to the contempt proceedings. 408 U.S. at 60-61.

When confronted with these questions the court below advanced the novel position that if the electronic surveillance was conducted pursuant to court order the witness is without just cause to refuse to answer. 491 F.2d 1162 (12a). This position lacks any legal or logical foundation.

Section 2515 provides that evidence derived from intercepted communications may not be received before any grand jury "where the disclosure of that information would be in violation of this chapter." It is beyond question that disclosure is violative of the statute if electronic surveillance is unlawful either because it was not pursuant to court order or because the court order did not comply with the requirements of the act. As this Court's

recent decision in *United States* v. *Giordano,* —— U.S. ——, No. 72-1057, Oct. Term 1973 (May 13, 1974) demonstrates only too well, it would be ludicrous to suggest that §2515 bars admission of one type of unlawful evidence before the grand jury but not the other.

This view is supported by the holding in *Gelbard,* since Gelbard himself *had been informed that the electronic surveillance was pursuant to court order.* Thus, no purpose would have been served by vacating the contempt order as to Gelbard if the existence of a court order terminated his right to litigate the legality of the electronic surveillance.

The fallacy to be found in the contentions of the court below is, it is respectfully submitted, amply answered by this Court's recent decision in *United States* v. *Giordano, supra.* There, this Court held that court orders authorizing electronic surveillance under Title III of the Omnibus Crime Control and Safe Streets Act were invalid because they had been procured upon the basis of Department of Justice application authorizations which were not executed in conformity with the provisions of 18 U.S.C. §2516(1). In light of *Giordano,* could it legitimately be contended, e.g., that the "Lindenbaum orders" were attackable only by a defendant once an indictment for a substantive offense had been returned against him and not attackable by a contemnor whose grand jury subpoena and subsequently compelled testimony had been obtained by the same invalid orders? It is too late in the day to assert that §2515 bars admission of one form of unlawful eavesdropping but not another.

Contrary to the opinion of the courts below, the legislative history of §2515 reveals that Congress intended the section to protect against invasion of privacy from unlawful electronic surveillance *regardless* of the nature of the illegality:

> "*Section 2515 of the new chapter imposes an evidentiary sanction to compel compliance with the other prohibitions of the chapter.* It provides that intercepted wire or oral communications or evidence derived therefrom may not be received in evidence in any proceeding before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision of a State, where the disclosure of that information would be in violation of this chapter. The provision must, of course, be read in light of section 2518(10)(a) discussed below, which defines the class entitled to make a motion to suppress. It largely reflects existing law. *It applies to suppress evidence directly* (*Nardone* v. *United States*, 58 S. Ct. 275, 302 U.S. 379 (1937) *or indirectly obtained in violation of the chapter.* (*Nardone* v. *United States*, 60 S. Ct. 266, 308 U.S. 338 (1939).) There is, however, no intention to change the attenuation rule. See *Nardone* v. *United States*, 127 F.2d 521 (2d Cir.), certiorari denied, 62 S. Ct. 1296, 316 U.S. 698 (1942); *Wong Sun* v. *United States*, 83 S. Ct. 407, 371 U.S. 471 (1963). Nor generally to press the scope of the suppression rule beyond present search and seizure law. See *Walder* v. *United States*, 74 S. Ct. 354, 347 U.S. 62 (1954). But it does apply across the board in both Federal and State proceedings. Compare *Schwartz* v.

> *Texas*, 73 S. Ct. 232, 344 U.S. 199 (1952). *And is not limited to criminal proceedings. Such a suppression rule is necessary and proper to protect privacy.* Compare, *Adams* v. *Maryland*, 74 S. Ct. 442, 347 U.S. 179 (1954); *Mapp* v. *Ohio*, 81 S. Ct. 1684, 367 U.S. 643 (1961). The provision thus forms an integral part of the system of limitations designed to protect privacy. Along with the criminal and civil remedies, it should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful intercession of wire and oral communications." (Emphasis added.) 1968 U.S. Code Cong. & Admin. News, at 2184-2185.

It is unthinkable in light of the broad sweep of the statute's language and the equally broad explanation of statutory purpose in the legislative history, that Congress did not intend the exclusionary rule of §2515 to apply where interceptions were pursuant to court order.

The legislative history of §2518(10)(a)[6] also supports the view that the defense afforded by §2515 entails a full motion to suppress:

> "Paragraph (10)(a) provides that any aggrieved persons, as defined in section 2510(11), discussed above, in any trial hearing or other proceeding in or before any court department, officer, agency, regulating body or other authority of the United States, a State, or a political subdivision of a State may make a motion to

[6] Section 2518(10)(a) provides the procedural vehicle for the defense contemplated by §2515 when a grand jury witness is held in contempt for refusing to answer questions predicated on unlawful electronic surveillance. As noted in *Gelbard*, the two sections must be read together. Thus, the scope of the motion to suppress available under §2515 is that embodied in §2518(10)(a).

suppress the contents of any intercepted wire or oral communication or evidence derived therefrom. [This provision must be read in connection with sections 2515 and 2517, discussed above, which it limits. It provides the remedy for the right created by section 2515.] Because no person is a party as such to a grand jury proceeding, the provision does not envision the making of a motion to suppress in the context of such a proceeding itself. Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforcible by an individual. (*Blue* v. *United States,* 86 S. Ct. 1416, 384 U.S. 251 (1965).) There is no intent to change this general rule. It is the intent of the provision only that when a motion to suppress is granted *in another context,* its scope may include use in a future grand jury proceeding. Nor is there any intent to grant jurisdiction to Federal courts over the Congress itself. See *Hearst* v. *Black,* 66 App. D.C. 313, 87 F.2d 68 (1936). Otherwise, the scope of the provision is intended to be comprehensive. [The motion may be made on the ground that: (i) the communication was unlawfully intercepted, (ii) the order of authorization or approval is insufficient on its face, or (iii) the interception was not made in conformity with the order. The motion must be made before the trial, *hearing or proceeding* unless there was no opportunity to make the motion or the person was not aware of the grounds of the motion, for example, when no notice was given under paragraph (9), discussed above.] Care must be exercised to avoid having a defendant defeat the right of appeal under paragraph (b), discussed below, by waiting until trial. (*Giacona* v. *United States,* 257 F. 450 (5th), *certiorari denied,* 79

> S. Ct. 113, 358 U.S. 873 (1958).) Upon the filing of such a motion to suppress, the court may make available to the person or his counsel such portions of the intercepted communications or evidence derived therefrom as the court determines to be in the interest of justice. This provision explicitly recognizes the propriety of limiting access to intercepted communications or evidence derived therefrom according to the exigencies of the situation. The motion to suppress envisioned by this paragraph should not be turned into a bill of discovery by the defendant in order that he may learn everything in the confidential files of the law enforcement agency. Nor should the privacy of other people be unduly invaded in the process of litigating the propriety of the interception of an aggrieved person's communications. (Emphasis added.) 1968 U.S. Code Cong. & Admin. News, at 2195.

The court below reasoned that a full motion to suppress would interrupt the smooth functioning of the grand jury. 491 F.2d 1160-1161, n. 3 (8a-9a). This objection lacks merit. Once a witness has been held in contempt he is removed from the stream of the grand jury's proceedings. Absent the opportunity to demonstrate his "just cause" the witness may remain in custody without further contact with the grand jury. Congress, however, by creating special legislation more protective of the rights of privacy than the Fourth Amendment, which privileges the grand jury witness to refuse to answer questions predicated on uulawful electronic surveillance, insures that the witness without a legitimate claim will more likely be returned to the stream of the grand jury process than the witness who, under the

theory of the courts below may be left to languish in jail during the life of the grand jury.

The essence of this Court's opinion in *Gelbard* is that, in defense to a contempt proceeding a witness may demonstrate that he had "just cause" to refuse to answer because the questions were predicated on unlawful electronic surveillance, in violation of the clear mandate of 18 U.S.C. §2515, whether or not such surveillance was court ordered. Petitioners were entitled to litigate the legality of the surveillance to which they were subjected and, absent an opportunity to do so, their refusals to answer do not constitute contempt within the meaning of 18 U.S.C. §1826(a).

II.

Certiorari should be granted because a conflict between the Circuits exists regarding the applicability of Fed. R. Crim. P. 42(b) to an 18 U.S.C. §1826(a) contempt proceeding.

These cases also raise the issue of whether proceedings under 28 U.S.C. §1826(a) are "summary" or whether the procedures embodied in Fed. R. Crim. P. 42(b) should apply.

It is clear that Fed. R. Crim. P. 42(b) applies where a witness is held in criminal contempt for an orderly refusal to testify, either at a trial or before a grand jury. *United States* v. *Wilson,* 488 F.2d 1231 (2d Cir. 1973); *United States* v. *Marra,* 482 F.2d 1196 (2d Cir. 1973); *United States* v. *Handler,* 476 F.2d 709 (2d Cir. 1973). The hallmark of such a contempt is a sentence, the purpose of which is punitive rather than coercive, and cannot be purged. *Shillitani* v. *United States,* 384 U.S. 364 (1966).

Section 1826(a) authorizes "summary" commitments for refusals to testify before a court or grand jury and the imposition of coercive sentences. Thus, proceedings under §1826(a) are in the nature of "civil" contempt, at least for the purposes of sentencing.

However, contempt proceedings are particularly difficult to characterize as wholly civil or wholly criminal for all relevant purposes.

In *United States* v. *Alter*, 482 F.2d 1016 (9th Cir. 1973), an immunized grand jury witness refused to answer questions on the ground that the questions derived from unlawful electronic surveillance of him or his attorney. The government represented that there was no surveillance of the witness but refused to respond to the inquiry about the attorney. Upon the witness' continued refusal to answer he was cited for contempt pursuant to §1826(a). Forty-five minutes later a hearing was held to determine whether the witness should be held in contempt. The Ninth Circuit held that this procedure was insufficient to permit the witness adequately to prepare a defense. It reasoned that, for purposes of the procedures to be followed, such a contempt was the same as a criminal contempt so that the provisions of Rule 42(b) were applicable:

> "At the threshold of *Gelbard*, the Court said that section 1826(a) was 'intended to codify the existing practice of the federal courts,' citing portions of its legislative history and *Shillitani* (408 U.S. at 42-43 n. 1, 92 S. Ct. at 2358). The unmistakable import of these observations is that section 1826(a) has no effect upon the procedural ground rules the Court had laid in cases anteceding that the enactment of the statute-rules

> which expressly forbade summary proceedings for such contempts. . . . we conclude that a proceeding in contempt to compel a federal grand jury witness to testify is civil enough to foreclose his claim that he has a constitutional right to trial by jury (*Shillitani*) and criminal enough to require the application of Rule 42(b) (*Harris*), a conclusion we reached less elaborately in United States v. Dinsio (9th Cir. 1972), 468 F.2d 1392. It follows, therefore, that Alter was entitled to notice prescribed by Rule 42(b) and to a reasonable time to prepare his defense, i.e. to show 'just cause' for refusing to respond." 482 F.2d at 1022-1023.

In the instant cases, the petitioners were held in contempt, denied bail and seized by the marshals immediately upon their refusals to testify.[7] Counsel objected to these procedures, requesting a Rule 42(b) hearing (46a).

The only justification for "summary" contempt proceedings is where the contempt is committed in the actual presence of the court and immediate action is necessary to preserve the integrity of the court.[8] *Orderly* refusals to testify, whether before a court or grand jury, whether the intended punishment be civil or criminal in nature, should never be punished summarily. Compare, *Mayberry* v. *Pennsylvania*, 400 U.S. 455 (1971). See also, *Theriault* v. *United*

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[7] Although Persico's applications for bail were denied by the district court, the Second Circuit and this Court, Judge Dooling denied Langella bail upon the erroneous assumption that a §1826 (a) contempt was not bailable. See, 28 U.S.C. §1826(b).

[8] The conditions precedent to a finding of "summary" contempt as set forth in Fed. R. Crim. P. 42(a). See also, *United States* v. *Seale*, 461 F.2d 345, 366-367 (7th Cir. 1972).

States, 481 F.2d 1193 (5th Cir. 1973). The basic components of due process, notice and an opportunity to be heard, as the Ninth Circuit has held, must be afforded before liberty may be forfeited under such circumstances.

Since the conflict between the Ninth and Second Circuits as to the applicability of Fed. R. Crim. P. 42 procedures to §1826(a) contempts will cause disparate treatment among contemnors, certiorari should be granted to resolve this conflict.

III.

The Court below disregarded the legal standard enunciated in *Stevens* v. *Marks*, 383 U.S. 234 (1966) when it reviewed petitioner Persico's claim that the description of the immunity given to him by government counsel was fatally misleading.

18 U.S.C. §6002 (Pub. L. 91-452, Title III, §201(a), 84 Stat. 927), provides that the immunity conferred under that section prohibits the "use" of that "testimony or other information compelled under the order [of immunity] or any information directly or indirectly derived from such testimony or other information," from being "used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." *Id.*

While §6002 confers "use" as opposed to "transactional" immunity, nevertheless,

> "The statute provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom . . . it imposes on

> the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Kastigar* v. *United States*, 406 U.S. 441, 460-61 (1972).

In *Kastigar*, this court upheld the constitutionality of §6002 in the face of a claim that the "use" immunity granted thereunder was not co-extensive with the privilege against self-incrimination, the petitioner there claiming that the Fifth Amendment required "transactional" immunity from *any* prosecution related to the scope of the investigation. In rejecting this claim, this Court, noted that prosecution by a state sovereign was impeded only to the same extent as the Federal government's use or derivative use of the testimony. *Kastigar, supra*, at 406 U.S. 459 n. 49, citing *Gardner* v. *Broderick*, 392 U.S. 273, 276 (1968). See also, *Zicarelli* v. *Investigation Commission*, 406 U.S. 472 (1972).

During the course of the grand jury proceedings in this case, government counsel explained to petitioner Persico the protection afforded to him by the grant of immunity[9] and its scope:

> "This order states that it will give you immunity. By this we mean, sir, you have [use] immunity. By that I mean everything you say cannot be used against you in a Court of law" (27a).

Subsequently, at a later time during the proceedings, Persico requested that the scope of the protection afforded him be explained:

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[9] Copies of the immunity orders for the witnesses Persico and Langella are set forth in the Appendix *infra*, at 19a and 20a.

"The Witness: About this immunity, how does this affect me in any prosecution with federal or state about questions asked here?

Mr. Del Grosso: Any testimony that you give here today cannot be used against you in any federal or state Court.

The Witness: Is that with the Internal Revenue and everything?

Mr. Del Grosso: That's right across the board. Anything you say today cannot be used against you. If the government should show independent evidence; that is, evidence independent of your testimony that can be used, however, anything you say cannot be used against you at any subsequent date that you may come before this grand jury. Do you understand that?

The Witness: Yes" (31a-32a).

Despite petitioner's (a layman) statement that he understood what the prosecutor had said, the description of the scope of the protection afforded was wholly deficient.

The Court below did not entirely disagree. Rather, after characterizing the explanation as neither "the epitome of either precision or lucidity," 491 F.2d at 1163 (13a), it nevertheless assumed that petitioner was "probably" sufficiently apprised of the extent of the immunity he had been granted because "experienced and competent counsel" had challenged the insufficiency of the government's explanation before the district court. *Id.* (13a). From this it inferred that petitioner was not misled. This is hardly the point, as this Court recognized in *Stevens* v. *Marks*, 383 U.S. 234 (1966). See also, *Raley* v. *Ohio*, 360 U.S. 423 (1959); *Bursey* v. *United States*, 466 F.2d 1059, 1081

(9th Cir. 1972); *People* v. *Masiello,* 28 N.Y.2d 287 (1971); *People* v. *Tramunti,* 29 N.Y.2d 28 (1971).

First, the prosecutor never explained that the grant of immunity protected Persico not only from prosecution based upon the testimony uttered itself, but also from the utilization of the fruits of that testimony, its exploitation and indirect use, in conformity with the "sweeping proscription" actually afforded by §6002. *Kastigar, supra; Counselman* v. *Hitchcock,* 142 U.S. 547 (1892).

Second, the prosecutor inaccurately informed the witness that it was merely his testimony that a state sovereign was prohibited from using against him, rather than fully explaining that the protection afforded him by §6002 from state prosecution was only as broad as the "use" prohibition imposed upon the federal government.

Thus, the prosecutor failed to fully inform the petitioner (1) as to the breadth of his protection from federal prosecution, and (2) as to the limits upon his protection from state prosecution. Compare, *Murphy* v. *Waterfront Commission,* 378 U.S. 52 (1964), in which the petitioners had been granted transactional immunity.

Having thus misinformed petitioner as to the scope of the immunity conferred, this Court's decision in *Stevens* v. *Marks, supra,* required the court below to vacate the contempt citation against Persico regardless of whether his counsel may or may not have been misled.

In *Stevens,* a member of the New York City Police Department who had been subpoenaed to appear before a state grand jury, signed a waiver of the privilege against self-incrimination and of immunity from prosecution in order to avoid removal from public office. After consulting

with counsel, Stevens attempted to withdraw his waiver in order to contest its validity and then refused to answer questions before the grand jury, asserting his privilege against self-incrimination. He was adjudged to be in contempt. This Court, per Mr. Justice Douglas, reversed the contempt convictions on the grounds, *inter alia,* that the officer had erroneously been led to believe that no immunity was available. The State of New York countered by contending that what Stevens believed was immaterial since he had obtained immunity by operation of law merely by testifying. 383 U.S. at 244. The State further suggested that the case be remanded to the New York courts for a hearing as to whether Stevens was misled by the District Attorney's statements. In declining to remand, this Court held:

> "A witness has, we think, a constitutional right to stand on the privilege against self-incrimination until it has been fairly demonstrated to him that an immunity, as broad in scope as the privilege it replaces is available and applicable to him . . .
>
> "The suggestion that we should remand the case to the New York courts for a finding of whether or not petitioner was misled is, we think, wide of the mark. A State must affirmatively demonstrate to the witness that a valid immunity from prosecution is his before it may hold him in contempt for refusing to answer questions that would otherwise be incriminating. Whether the State has met its burden must be measured at the time of the alleged contempt." 383 U.S. at 246 and n. 11.

This Court thus ruled that the petitioner's state of mind was irrelevant so long as at the time of the alleged con-

tempt a deficient explanation of immunity had, as here, been given by the prosecutor.

The court below totally ignored the standard of review set forth in *Stevens*, although *Stevens* had been cited to it, and, instead interposed its own subjective estimate, based on Persico's counsel's "competency and experience," that Persico was "probably" not misled.

Certiorari should be granted and the decision below reversed so as to make clear the continuing validity of the *Stevens* rule that when immunity is conferred it must be described with "unmistakable clarity." *Bursey, supra.*

CONCLUSION

For all of the foregoing reasons, certiorari should be granted and the judgments below reversed.

Respectfully submitted,

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